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Supreme Court of the United States

ANGELA KHOROZIAN,

Petitioner,

– against –

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the bank fraud statute (18 U.S.C. § 1344), which makes illegal a scheme to defraud a bank, requires a specific intent to cause a bank an actual or potential loss of its own funds — or, is it sufficient to merely establish the commission of an act that "*could*" put a bank at risk of loss, without any specific intent to harm the bank.[1]

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[1] The Solicitor General concedes that the circuits are split on this constitutional question. A similar petition for certiorari, involving the identical issue, is also currently pending in this Court. *See McNeil v. United States*, No. 02-10904 (scheduled for conference on September 29, 2003).

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Petitioner Angela Khorozian respectfully requests that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding. The opinion was filed on June 20, 2003, and amended on August 25, 2003.

OPINIONS AND ORDERS BELOW

(1) The opinion of the Third Circuit, dated June 20, 2003, affirming Petitioner's conviction for bank fraud is reprinted in the Appendix hereto, App. 1-19.

(2) The order, dated July 22, 2003, denying Petitioner's Petition for Rehearing and Suggestion for Rehearing *en Banc* is reprinted at App. 21-22.

(3) Two months after the Third Circuit affirmed Petitioner's conviction, the court, *sua sponte*, amended its opinion. The amended decision, dated August 25, 2003, is reported at *United States v. Khorozian*, 333 F.3d 498 (3d Cir. 2003). The order amending the Slip Opinion is reprinted at App. 23-27.

(4) On August 14, 2003, the Third Circuit granted Petitioner's motion to stay the issuance of the mandate pending a Petition for a Writ of Certiorari. That order is reprinted at App. 29.

JURISDICTION

The opinion and judgment of the Third Circuit were filed on June 20, 2003. A Petition for Rehearing and Suggestion for Rehearing *en Banc* was denied by the Third Circuit on July 22, 2003. The 90-day period for

filing this petition for certiorari expires on October 20, 2003.[1] *See* Rules 13.1 and 30.1. The jurisdiction of this Court to review the ruling of the Third Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be deprived of life, liberty, or property, without due process of law . . . .

18 U.S.C. § 1344, entitled Bank Fraud, provides as follows:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice —
>
> (1) to defraud a financial institution; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;
>
> shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

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[1] The judgment of the Third Circuit was substantially amended on August 25, 2003, by a precedential order. Therefore, the period for filing this petition may, arguably, expire on November 24, 2003.

STATEMENT OF THE CASE

Petitioner Angela Khorozian is a 51-year-old mother of three who has no prior criminal history. In May of 2000, in connection with an investment opportunity, a longtime friend, Eduardo Queirolo, the owner of a large sugar refining operation in Brazil, obtained two checks that he wanted deposited in the United States. The checks came from reliable American corporations[2] and were made payable to a third party (C.A. Supp. App. 61). In order to be certain that there was nothing wrong with the checks, Queirolo traveled from Brazil to Uruguay to assure himself that the funds were not derived from arms trafficking, drugs, or any other kind of major crime (C.A. Supp. App. 52, 63).

Queirolo also had an acquaintance, who managed a large currency exchange in Uruguay, with branches in New York, investigate the checks to make sure that they were legitimate (C.A. Supp. App. 53). The exchange manager faxed the checks back to Queirolo and, written in the margin, was an indication that the companies were "good," that they "had funds," and the numbers of the checks were "correct" (C.A. Supp. App. 53).

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[2] One check was from Costco Wholesale Corporation ("Costco") for $9,652,345.25 (C.A. Supp. App. 19). Costco announced net sales of $31.62 billion for the 2000 fiscal year. *See Costco Wholesale Corporation Releases Fourth Quarter and Fiscal Year 2000 Results of Operation*, Business Wire (Oct. 12, 2000), available at *http://www.Costco.com* (visited Jan. 8, 2003). The second check was from Liberty Carton Company, in Minnesota, for $10,746,527.50 (C.A. Supp. App. 18).

Petitioner Did Not Know that the Checks Were Counterfeit

At the end of May, Queirolo brought the checks to the United States. Prior to his arrival, Angela Khorozian had opened a corporate account at Hudson United Bank in New Jersey.[3] When Queirolo arrived from Brazil they deposited the checks, which they both believed were "perfectly good," in the account (C.A. Supp. App. 62).[4] Thereafter, the bank discovered that the checks, which appeared to be genuine on their face, were counterfeit. Even though Petitioner and Queirolo were unaware that the checks were counterfeit, they were both arrested.

The government initially alleged that the Defendants knew that the checks were counterfeit. However, after further investigation, the indictment was subsequently superseded to remove any claim that either Queirolo or Petitioner knew of the counterfeit nature of the checks (C.A. App. 20). Instead, the superseding indictment alleged a scheme to defraud by the use of fraudulent

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[3] The account was in the name of a company that she had once formed for investment purposes. Petitioner engaged a certified public accountant, who was a member of the bank's advisory board, to activate the dormant company and make it ready for business (C.A. App. 313).

[4] Although he made certain that the checks did not relate to the proceeds of any illegal conduct, Queirolo did believe that the checks represented money for which taxes had not been paid in Brazil (C.A. Supp. App. 62). However, failure to pay taxes in a foreign country does not constitute an offense in the United States (C.A. Supp. App. 81).

misrepresentations to induce the bank to pay out the proceeds of the checks to obtain substantial commissions for negotiating the checks (C.A. App. 21).[5]

None of the Alleged Misrepresentations Made to the Bank Caused Any Harm

The misrepresentations alleged in the indictment were that Petitioner (1) failed to disclose that her company's corporate status had been revoked by the State of New Jersey for failure to file annual reports; (2) represented that she expected the funds to be wired but, instead, they were actually received by check; (3) presented Queirolo to the bank representative as Luiz Carlos Teixeira; and (4) indicated that the proceeds of the checks were to be invested in a sugar plantation in Africa (C.A. App. 22-23).

However, the defense argued the immateriality of the statements. For instance, it made no difference to the bank's financial integrity if the funds were to be used for the development of a hotel rather than a sugar plantation.[6] Even the trial judge recognized that *what* Angela Khorozian intended to do with the money could *not* be a material misrepresentation to the bank (C.A. Supp. App. 82-83). Moreover, any statement concerning the legal status of the corporation was immaterial because New Jersey law specifically provides that an entity, which has lost its corporate status, because of a failure to file annual reports, can have its certificate

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[5] Petitioner was charged with one count of bank fraud, in violation of 18 U.S.C. § 1344, and one count of conspiracy to commit bank fraud, in violation of 18 U.S.C. § 371 (C.A. App. 20).

[6] There is compelling proof that Petitioner was working with a development project to obtain funding to build a hotel in the African Republic of Chad (C.A. Supp. App. 137; C.A. App. 315-19).

of incorporation *reinstated*. The reinstatement is retroactive and validates all actions taken in the interim.[7]

Also, any suggestion that the funds would be sent by wire, without knowledge that the checks were counterfeit, could not harm the bank. While a statement concerning how the funds would be received might bear on the bank's initial decision to open the account, it would not influence the bank's ultimate decision to accept the checks. A bank is not exposed to loss through the mere opening of an account. It is only when the bank accepts and processes a defective check that it is placed at risk. Simply put, none of the misrepresentations ever put the bank at risk of any economic loss.

The District Judge Made a Conclusive Finding that There was No Evidence that Petitioner Knew the Checks were Counterfeit

At Petitioner's trial, the defense argued that since neither defendant knew that the checks were counterfeit, and both believed that the checks were supported by adequate funds, there was no scheme to defraud the bank because they intended it no harm. Significantly, Queirolo — who was the cooperating witness for the government — testified that he never intended to defraud the bank by depositing what he believed to be *bona fide* checks (C.A. Supp. App. 62, 77).

In light of Queirolo's uncontested testimony, the district judge made a specific finding, pursuant to Rule 29 of the Federal Rules of Criminal Procedure, that there was *no evidence* from which the jury could conclude

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[7] N.J.S.A. 14A:4-5(7).

that Angela Khorozian knew the checks were counterfeit (C.A. Supp. App. 83). In the face of the court's conclusive finding, the prosecutor argued to the jury that the question of Petitioner's intent was "*[n]ot* whether she thought the checks were good or not, but whether she engaged in fraudulent misrepresentations to the bank" (C.A. Supp. App. 251) (emphasis supplied).[8] Thus, the case was presented on the theory that false representations were made to the bank, rather than any claim that Petitioner *knowingly* presented counterfeit checks for deposit with an intent to cause the bank any financial harm (C.A. App. 222).

The district judge instructed the jury that "the government may meet its burden to prove intent through evidence that the defendant made a material misstatement of fact with reckless disregard for the truth" (App. 16). The court also charged the jury that a "scheme or artifice to defraud may be found where there has been a departure from basic honesty, fair play and candid dealings" (C.A. App. 223, 224, 229). Petitioner complained that this emasculated the specific intent required under § 1344.

The jury deliberated for two days before finding Petitioner guilty of bank fraud and conspiracy to commit bank fraud. On June 26, 2002, the district judge sentenced her to an 18-month term of imprisonment.[9]

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[8] The government later argued in the Third Circuit that "a conviction under the bank fraud statute does not require that Khorozian knew that the checks were invalid, only that she made material representations to the bank that put it at risk of loss" (App. 7-8).

[9] The district court granted Petitioner bail pending appeal and the Third Circuit stayed the issuance of its mandate pending this petition (App. 29).

On June 20, 2003, the Third Circuit affirmed Angela Khorozian's conviction. In a published decision, the court held that the specific intent requirement of § 1344 is "satisfied if an individual commits an act that *could* put the bank at risk of loss" and that Petitioner's "actions" or misrepresentations *could* have put the bank at risk (App. 9-10).[10] The court also concluded that the judge's jury instructions were proper (App. 15-17).

The panel then rejected Petitioner's due process claim regarding the district judge's refusal to introduce into evidence a contract that had been faxed to a witness in Africa, which would have confirmed (1) the investment opportunity and (2) the fact that Petitioner and the payee of the checks, Teixeira, had a commercial relationship *before* the checks were brought to the United States (App. 12-14). However, the court subsequently amended this aspect of its decision and held that the district judge was "mistaken" in excluding the fax but those errors were "harmless" (App. 23-27).

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[10] In addition, the court held that the jury could have found that Petitioner was "willfully blind" to the fact that the checks were counterfeit and that willful blindness constitutes "sufficient fraudulent intent under § 1344" (App. 8-9). The defense objected to the willful blindness instruction and argued that where there is *no evidence* of knowledge of the checks' invalidity, as demonstrated by the trial judge's *finding* that there was no proof that Petitioner knew that the checks were counterfeit, willful blindness can never be used to satisfy such a failure of proof. Moreover, the doctrine of willful blindness cannot be used to supply evidence of a specific intent under § 1344.

REASONS FOR GRANTING CERTIORARI

The presiding question presented by this petition, which is of exceptional importance, concerns the scope of the bank fraud statute (18 U.S.C. § 1344) and whether it requires a specific intent to cause a bank an actual or potential loss of its funds. Or, whether the mere commission of an act "that *could* put the bank at risk of loss" is sufficient to sustain a conviction under § 1344. This issue has created a clear conflict among the circuit courts that is a matter of growing constitutional concern. Even the Solicitor General agrees that the circuits are *divided* on this crucial question. Moreover, there is now pending before the Court a similar petition for certiorari, from the Ninth Circuit, that presents this identical issue.[11] Thus, there is an urgent need for this Court's intervention to resolve the conflicts among the circuits concerning the proper administration of the bank fraud statute.

1. In a Similar Case Now Pending on Certiorari Before this Court (02-10904) the Solicitor General Concedes That There Is a Split in the Circuit Courts Concerning the Specific Intent Necessary to Constitute Bank Fraud

The First Circuit, sitting *en banc*, recently observed that "there are no Supreme Court precedents that define the intent necessary for a bank fraud conviction," and that there is "no consensus among the circuits on the issue."[12] The Solicitor General also agrees that

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[11] *See McNeil v. United States*, No. 02-10904. The *McNeil* Petition is scheduled to be conferenced on September 29, 2003.

[12] *United States v. Kenrick*, 221 F.3d 19, 27 (1st Cir. 2000) (*en banc*), *cert. denied*, 531 U.S. 961 (2000).

"[t]his Court has not defined the intent that a defendant must possess in order to violate the bank fraud statute" and went on to state that the disagreement among the circuits "concerns whether, in order to establish that the defendant possessed the requisite intent to defraud, the government must prove that the defendant exposed, or intended to expose, a bank to the risk of financial loss."[13]

2. The Second, Fourth, Fifth and Seventh Circuits Hold that 18 U.S.C. § 1344 Requires a Specific Intent to Harm a Bank

Although the lengthening battle lines that divide the circuits are still not clearly defined, the courts of appeals seem to be digging in along their diverging fronts. For example, the Solicitor General acknowledges that the Second, Fifth and Seventh Circuits are united in their belief that the government must prove that the defendant intended to expose the bank to an actual or potential loss of its own funds.[14] These circuit courts

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[13] Brief for Solicitor General in Opp. to Cert. at 7-8, *McNeil v. United States*, No. 02-10904 ("[t]here is some disagreement among the courts of appeals"); *see also* Brief of Solicitor General in Opp. to Cert. at 10, *Whitmore v. United States*, No. 02-126 ("the courts of appeals disagree on whether exposing or intending to expose a financial institution to a risk of loss is an element of bank fraud").

[14] Brief for Solicitor General in Opp. to Cert. at 8, *McNeil v. United States*, No. 02-10904, citing *United States v. Rodriguez*, 140 F.3d 163, 168 (2d Cir. 1998); *United States v. Odiodio*, 244 F.3d 398, 401 (5th Cir. 2001); and *United States v. Davis*, 989 F.2d 244, 246-47 (7th Cir. 1993). The Solicitor General also observed that the Fourth Circuit has held that exposing the bank to an "actual or potential risk of loss" is a required element of bank fraud. *United States v. Brandon*, 298 F.3d 307, 311-12 (4th Cir. 2002) ("a conviction under § 1344 is not supportable by evidence merely that some person other than a federally insured financial institution was defrauded in a way that happened to involve banking, without evidence that such an institution was an intended victim").

have remained faithful to the conventional reading of § 1344, in their firm belief that the bank fraud statute requires a specific intent to victimize a bank.[15]

3. The First, Sixth, Ninth, Tenth and Eleventh Circuits Hold that § 1344 Does Not Require Specific Intent to Harm a Bank

In contrast, the First, Sixth, Tenth and Eleventh Circuits have defected from the traditional notion of requiring the government to prove that a defendant intended to cause a bank any financial loss.[16] Instead, they hold that a defendant may be found guilty of bank fraud — and subjected to a sentence of up to 30 years

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[15] *See also United States v. Crisci*, 273 F.3d 235, 239-40 (2d Cir. 2001) (the government must prove that the defendant "possessed an intent to victimize the [financial] institution by exposing it to actual or potential loss" and that "a bank was an actual or intended victim of defendant's scheme"); *United States v. Lamarre*, 248 F.3d 642 (7th Cir. 2001), *cert. denied*, 533 U.S. 963 (2001) (a "bank fraud conviction requires proof that a defendant had the specific intent to defraud the bank"); *United States v. Lane*, 323 F.3d 568, 583 (7th Cir. 2003), *petition for cert. filed*, 71 U.S.L.W. 3759 (May 19, 2003) (No. 02-1725) (§ 1344 "requires the showing of an intent to deceive a bank in order to obtain from it money or other property").

[16] Brief for Solicitor General in Opp. to Cert. at 8, *McNeil v. United States*, No. 02-10904, citing *United States v. Kenrick*, 221 F.3d 19, 22, 29 (1st Cir. 2000) (*en banc*) ("intent to harm" is "not an element of bank fraud"), *cert. denied*, 531 U.S. 961 (2000); *United States v. Everett*, 270 F.3d 986, 991 (6th Cir. 2001), *cert. denied*, 123 S. Ct. 125 (2002); *United States v. Sapp*, 53 F.3d 1100, 1103 (10th Cir. 1995), *cert. denied*, 516 U.S. 1082 (1996); and *United States v. De La Mata*, 266 F.3d 1275, 1298 (11th Cir. 2001), *cert. denied*, 535 U.S. 989 (2002). *See also United States v. McNeil*, 320 F.3d 1034 (9th Cir. 2003), *petition for cert. filed* (May 22, 2003) (No. 02-10904). Because of ambiguities in the case law, it is difficult to classify each circuit's position. But, if anything, this adds weight to our argument that this Court's intervention is required to dispel the mounting confusion that is encircling the bank fraud statute.

incarceration — without any showing that he *intended* to harm the bank. Because of the constitutional consequences of the drastic approach adopted by the defecting circuits, Christopher Eric McNeil, from the Ninth Circuit, has also sought certiorari in a separate petition filed on May 22, 2003, on this very issue. *See McNeil v. United States*, No. 02-10904. McNeil's petition is scheduled to be acted upon on September 29, 2003.

4. The Third Circuit is a "House Divided" on the Issue of What Specific Intent is Required Under the Bank Fraud Statute

To further complicate matters, the United States Court of Appeals for the Third Circuit is, itself, a "house divided" on the proper interpretation of § 1344. In *United States v. Thomas*, 315 F.3d 190 (3d Cir. 2002), three members of that court, underscoring the "troublesome question concerning the correct construction of the federal bank fraud statute," concluded that "harm or loss to the bank must be contemplated by the wrongdoer to make out a crime of bank fraud." 315 F.3d at 193, 200. The panel went on to hold that § 1344 requires the specific intent to cause a bank "an actual or potential loss of its own funds." 315 F.3d at 206.

Thus, it appeared as though the Third Circuit had joined with the Second, Fourth, Fifth and Seventh Circuits in their view that § 1344 requires proof that the defendant intended to cause the bank some

financial risk.[17] Nevertheless, another panel of the court subsequently issued its decision in Petitioner's case, which is at odds with *Thomas* and has substantially added to the rising turmoil.

In *Khorozian*, the court held that § 1344's "specific intent requirement is satisfied if an individual *commits an act* that *could* put the bank at risk of loss" (App. 10) (emphasis supplied). This decision, which effectively reads out of § 1344 any requirement that the defendant *intended* to jeopardize the bank — and, instead, focuses on the defendant's *actions* rather than her *intent* — brings the Third Circuit more in line with the holdings of the First and Ninth Circuits, which do not require any intent to harm the bank.

There is simply no way to reconcile these two recent conflicting decisions from the Third Circuit. Although opposing precedent within a circuit, on its own, may not be sufficient to warrant review by this Court, such an inconsistency is certainly a compelling circumstance that has, in the past, justified a grant of certiorari. This is especially true where, as here, the intra-circuit conflict involves a recurring and volatile issue, which is accompanied by a widespread conflict among the other circuits.[18]

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[17] In fact, the Solicitor General counted the Third Circuit in the alignment of courts that require the government to prove an intent to expose the bank to an actual or potential loss. *See* Brief for Solicitor General in Opp. to Cert. at 8, *McNeil v. United States*, No. 02-10904.

[18] *See John Hancock Mutual Life Ins. Co. v. Bartels*, 308 U.S. 180, 181 (1939) (certiorari granted because of conflict within the Fifth Circuit and the importance of the question); *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 508 (1950) (limited grant of

5. The Growing Conflict in the Circuit Courts Over the Scope of the Bank Fraud Statute Desperately Needs to be Resolved

It is at once apparent that the courts of appeals throughout the country are in a deplorable state of disarray over the question involving what are the specific intent requirements of § 1344. At present, there is no presiding or prevailing view concerning the degree of intent required for bank fraud. Instead, there is only a disparate variety of rules fashioned by the competing circuit courts bearing on what § 1344 requires in the way of specific intent. Therefore, there is a pressing need for a uniform policy concerning the administration of the bank fraud statute, which will also satisfy the constitutional necessities of the Fifth Amendment's due process clause.

The magnitude of this issue is further accentuated by the realization that in 2002, *1,510 defendants* were charged with bank fraud in district courts throughout the United States.[19] The fact that § 1344 ranks among

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certiorari because of intra-circuit conflict resulting from precedent established "by a differently constituted court of the same Circuit"); *Scarborough v. United States*, 431 U.S. 563, 567 n.4 (1977) (intra-circuit split in the Ninth Circuit noted as well as a conflict among the Circuits); *see also Maggio v. Zeitz*, 333 U.S. 56, 59-60 (1948); Robert L. Stern & Eugene Gressman *et al.*, *Supreme Court Practice* § 4.6 (BNA Books 8th ed. 2002). Significantly, Rule 10(a) provides that certiorari may be granted where a court of appeals has "so far departed from the accepted and usual course of judicial proceedings, or sanctioned a departure by a lower court, as to call for an exercise of this Court's supervisory power."

[19] Whereas, in 2002 there were only 1,586 mail fraud prosecutions. Table 5.24, *Sourcebook of Criminal Justice Statistics Online, 2002*, U.S. Department of Justice, Bureau of Justice Statistics, Washington, DC, available at *http://www.Albany.edu/sourcebook/1995/pdf/t524.pdf.*

one of the most highly mobilized criminal provisions utilized by prosecutors lends enormous force to the questions presented by this petition — and amplifies the need for uniformity in its enforcement.

6. Commentators Describe this Conflict over the Proper Construction of the Bank Fraud Statute as an Issue that is Ripe for Certiorari Review

Several leading commentators in the area of fraud prosecutions, including the former Chief of the Criminal Division of the United States Attorney's Office in New York, have underlined this crucial conflict by focusing on the clash between the Second, Third, Seventh and Ninth Circuits.[20] This conflict has even been described as *the* leading "white-collar crime issue" in the nation today and is bound to be a source of continuing controversy "in the current prosecutorial climate."[21] Put more bluntly, the reality that this issue involves one of the most dangerous and fiercely exploited statutory weapons in a federal prosecutor's armory emphasizes why certiorari is imperative.

Recognizing the importance of imposing order in the highly perilous sphere of federal fraud, this Court recently granted certiorari to resolve a conflict in the circuits relating to whether "materiality" is an element of a scheme to defraud under the bank, mail, and

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[20] *See* Elkan Abramowitz, *Issues Ripe for U.S. Supreme Court Review*, N.Y.L.J., Sept. 2, 2003, at 3. Mr. Abramowitz stresses that "[c]ourts have taken varying approaches to the question of how much of a nexus there must be between a federally insured bank and a fraudulent scheme to sustain a prosecution under the federal bank fraud statute."

[21] *Id.*

wire fraud statutes. In *Neder v. United States*, 527 U.S. 1, 7 (1999), this Court stabilized another divided and fragmented aspect of the law of bank fraud.[22] The same authoritative supervision is now needed for the troubling dispute regarding the specific intent requirements of § 1344, because here the disparity among the circuits is even more acute.[23] As with *Neder*, there is an urgent need for some measure of doctrinal certitude concerning the scope of the bank fraud statute in order to guide judges, prosecutors and defense lawyers in this prominent and rapidly expanding field of prosecution.

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[22] At the time *Neder* was considered by this Court, several circuit courts had issued conflicting decisions regarding materiality in fraud prosecutions. For example, the Eleventh Circuit was somewhat divided on the question of whether materiality is an element of federal fraud. *Compare United States v. Pitt*, 717 F.2d 1334, 1339 (11th Cir. 1983), *cert. denied*, 465 U.S. 1068 (1984) (omitting materiality as an element of wire fraud), with *United States v. Goldsmith*, 109 F.3d 714, 715 (11th Cir. 1997) (including materiality as an element of bank fraud). In addition to that inter-circuit split, the Tenth Circuit concluded that although materiality is not an element of wire fraud, "there is a materiality aspect to the determination of whether the acts of an accused give rise to a scheme to defraud." *United States v. Cochran*, 109 F.3d 660, 668 n.3 (10th Cir. 1997). *See* John S. Slosson, *Neder v. United States - Materiality in Bank Fraud Prosecutions*, 4 N.C. Banking Inst. 655, 661 (April 2000).

[23] This Court also recently granted certiorari and was able to settle an equally divisive question regarding how and when a defendant may challenge trial counsel's effectiveness. *Massaro v. United States*, 123 S. Ct. 1690 (2003).

7. *This* is the Appropriate Case to Resolve the Conflicts Among the Circuits Concerning the Scope of the Bank Fraud Statute

Although the Solicitor General recognizes that this area of the law is in conflict, nevertheless, in several recent cases the Solicitor General's Office has argued that certiorari should be denied because the particular case was "not an appropriate vehicle for this Court to resolve the disagreement among the courts of appeals."[24]

We urge that this case *is* the appropriate "vehicle" for this Court to finally resolve this clear conflict among the circuits. First, the Solicitor General indicated its opposition to the Third Circuit's earlier holding that the government must prove that a defendant intended to expose the bank to an actual or potential loss.[25] Second, this case contains an ideal factual basis that provides a fair foundation to resolve the partisan views existing among the different courts of appeals. For example, Petitioner submitted checks to a bank without knowing they were counterfeit. However, even though there was absolutely no proof that Petitioner believed that this would cause the bank any loss,

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[24] In *McNeil*, the Solicitor General urges that review is not warranted because (1) the decision of the Ninth Circuit is correct; (2) the case does not involve the factual situation that has given rise to the disagreement among the courts of appeals; and (3) any defendant who engaged in the conduct in which that petitioner engaged would be subject to federal prosecution for wire fraud, even if he were not subject to prosecution for bank fraud, so the question of whether a bank fraud prosecution was viable under that factual situation is "not of general importance." Brief for Solicitor General in Opp. to Cert. at 9, *McNeil v. United States*, No. 02-10904.

[25] *See* Brief for Solicitor General in Opp. to Cert. at 8-9, *McNeil v. United States*, No. 02-10904, citing *United States v. Thomas*, 315 F.3d 190, 200 (3d Cir. 2002).

she still suffered the brutal sanctions of a bank fraud conviction merely because she *did* an act that "*could*" expose the bank to a risk of loss. But, in the Second or Seventh Circuits she would have been spared that conviction because she could not be found guilty of bank fraud without proof that she actually intended to defraud the bank by causing it harm.[26] In a nation that takes pride in its principles of equal protection of the law, this is constitutionally unacceptable.

Moreover, here the district court refused to instruct the jury that the government had to prove that Petitioner intended to victimize the bank by causing it an actual or potential loss of its funds. Finally, Petitioner was not subject to any other criminal provisions that would render a decision in this case moot. Therefore, this case does, indeed, present the proper vehicle for this Court's consideration, and is further facilitated by the pure nature of this important constitutional issue.

To summarize, the concerns expressed by the different courts both for and against a strict construction of the bank fraud statute have now been joined in this single case, which provides an appropriate platform for clarifying the intent requirements of § 1344. This case, more than any other, brings squarely into focus the conflict among the circuits and will enable the Court to decide the proper scope of the bank fraud statute.

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[26] The mere "act" of depositing the checks, standing alone, without proof that she intended to cause the bank any loss of its own funds, is now sufficient in the Third Circuit to fulfill the requirements of the bank fraud statute.

Without some uniform resolution concerning the application of § 1344, appellate review in bank fraud prosecutions will continue to proliferate as the battle lines that zigzag through the many different circuits become more deeply entrenched. It is an issue that will endure and will, undoubtedly, return to this Court again and again until it is finally resolved.

8. Expanding the Reach of the Bank Fraud Statute to Cover Every Act that "Could" Put a Bank at Risk of Loss Creates Serious Jurisdictional Concerns

Review of the *Khorozian* decision is also warranted because not only has the Third Circuit now further hardened the lines drawn between the circuits, but by eliminating the specific intent to defraud, customarily associated with all fraud statutes, the court has radically distorted the discreet jurisdictional reach of § 1344.[27] This, of course, presents a proposition of the highest importance and raises profound policy implications that will seriously affect the administration of the federal bank fraud statute.

A rule that imposes criminal liability on anyone who makes a false statement to a bank that "could" create a risk of loss is a woefully inadequate standard by which to judge the culpability of a person's actions.

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[27] The basic intuition underlying the bank fraud statute was to punish those frauds in which "the *victims* are financial institutions." S. Rep. No. 98-225, reprinted in 1984 U.S.C.C.A.N. 3182, 3517 (emphasis supplied). The statute is "primarily concerned with 'fraudulent schemes where banks are *victims*.'" H.R.Rep. No. 98-901 (1984) (emphasis supplied). Thus, it seems clear from the legislative history that the bank fraud statute is limited to those frauds which are perpetrated directly on financial institutions.

It bears repeating that since § 1344 is one of the most aggressively enforced of all criminal statutes, this overly expansive reading creates a compelling need for certiorari to ensure that the established jurisdictional boundaries of § 1344, fixed by Congress and endorsed by the Second, Fourth, Fifth and Seventh Circuits, remain intact.

Traditional notions of bank fraud require an actual intent to defraud — not the mere possibility of some potential risk occurring because misinformation may have been provided to the bank. Under § 1344, if the scheme itself does not have, as its underlying purpose, deprivation of the bank's funds or placing the bank at risk, there can be no bank fraud. Thus, the true jurisdictional dispensing element of bank fraud is the specific intent to cause the bank harm.[28]

This Court has never suggested that the harm or deprivation of property component, so essential to the "intent to defraud" element of the federal fraud statutes, can be enlarged to reach the limitless contingencies spawned by what "could" or might create a risk of loss to a protected institution.[29] Under the Third Circuit's

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[28] As properly noted by the Solicitor General, the "essence" of bank fraud is "the intent to defraud" and a person cannot commit that offense "without at least intending that his fraudulent scheme cause the victim to part with money, property, or some other interest." Brief for Solicitor General, *Neder v. United States*, No. 97-1985, available at 1999 WL 6660, *40.

[29] At the very heart of all federal fraud statutes is the requirement that the accused *intends*, in some way, to profit at the expense of the victim. In *Morissette v. United States*, 342 U.S. 246, 250-51 (1952), this Court observed that the "contention that an injury can amount to a crime only when inflicted by intention" is as "universal and persistent" as belief in "freedom of the human will" and a "duty of the normal individual to choose between good and evil." It has long

ruling, almost any misrepresentation made to a bank has the potential to put the bank at risk of loss. The use of the indefinite word "could," that ostensibly contemplates even a *possibility* of harm, enlarges the reach of § 1344 beyond anything imaginable. This elusive criteria cannot be substituted for the far more stringent and quantifiable measure that is constitutionally mandated in all federal fraud prosecutions.

Moreover, there is a dangerous power in ambiguity. The fatally vague standard of "could" extends the bank fraud statute far beyond all constitutional limits and is capable of criminalizing a wide variety of harmless misrepresentations frequently made in the busy banking world.[30]

Furthermore, there is a considerable difference between committing an act that "could" put a bank at a risk of loss, and intending to cause the bank an actual loss of its own funds. We urge that the framers of § 1344 never intended that a defendant, who does not contemplate some actual harm to a bank, may be subjected to a 30-year prison sentence for acts that might place a bank at risk, without any intent to actually do so. Thus,

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been recognized that "to constitute any crime there must first be a 'vicious will.'" *Id.* Even the most passing familiarity with statutory construction leads to the obvious conclusion that a specific criminal intent to harm the bank is absolutely essential for a violation of § 1344.

[30] In 2001, there were *600,085* reported incidents of some form of check fraud in banks throughout the country. American Bankers Association Deposit Account Fraud Survey Report, 2002, reported at *http://www.microbanker.com/artarchive02/030101AttemptedCheckFraud Doubles.html. See also Check Fraud is On the Rise*, The Plain Dealer, Dec. 2, 2002, available at 2002 WL 6385018. We assume that many of these instances may have involved persons who unwittingly deposited checks that turned out to be invalid.

it is imperative that the stronger level of criminal intent that historically has been an indispensable part of the bank fraud statute, be retained.[31]

It is worth remembering that the jurisdictional excesses regarding federal criminal statutes are of accretion.[32] And, policy considerations require that the gradually evolving process of infringement be halted at its early stages, before it goes too far. The stance taken by the Third Circuit, as well as its confederated circuits, is bound to have grave consequences for hundreds of citizens who may face conviction in one circuit but not in another. This is why the intervention of this Court is so badly needed. In a word, bank fraud must be the product of a culpable mind that intends to harm the bank. Without some uniform resolution concerning the application of § 1344, the growing confusion in this crucial area of the law will become intolerable. Finally, the force of the arguments in favor of keeping the reach of § 1344 within constitutional bounds, by

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[31] The Solicitor General has acknowledged that the distinct intent requirement embodied in the federal fraud statutes "effectively narrows the scope of deceptive conduct reached by the statute." Brief for Solicitor General, *Neder v. United States*, No. 97-1985, available at 1999 WL 6660, *43. Moreover, the deprivation of property requirement limits the scope of the fraud statutes to those "schemes that the defendant subjectively intends would defraud a victim, or would enable the defendant to *obtain money or property* from the victim by deceptive means." *Id.* at *44 (emphasis supplied). It seems that the government agrees that the conventional "intent to defraud" characterized by all fraud statutes is indispensable for maintaining the narrow scope of those laws.

[32] *See Cleveland v. United States*, 531 U.S. 12, 27 (2000) ("[a]bsent clear statement by Congress, we will not read the mail fraud statute to place under federal superintendence a vast array of conduct traditionally policed by the States").

insisting upon a specific intent to cause a bank harm, are so fundamental and so humane that they cry out for certiorari.

CONCLUSION

For all these reasons, Petitioner prays that a Writ of Certiorari issue to review the Third Circuit's opinion in this case.

Respectfully submitted,

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PRECEDENTIAL

Filed June 20, 2003

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-2820

UNITED STATES OF AMERICA

v.

ANGELA KHOROZIAN,

Appellant

Appeal from the United States District Court
for the District of New Jersey
(D. C. Criminal Action No. 00-cr-00393-1)
District Judge: Honorable William H. Walls

Argued April 24, 2003

Before: SCIRICA,* *Chief Judge*,
AMBRO and GARTH, *Circuit Judges*

(Opinion filed June 20, 2003)

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* Judge Scirica began his term as Chief Judge on May 4, 2003.

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OPINION OF THE COURT

AMBRO, *Circuit Judge*:

We address the scope of the federal bank fraud statute, 18 U.S.C. § 1344. Angela Khorozian appeals her conviction on the ground that she could not have conspired to commit, and could not have committed, bank fraud by negotiating counterfeit checks because she did not know that those checks were counterfeit. She also alleges various errors in the District Court's evidentiary rulings, jury instructions, and application of the Sentencing Guidelines. We affirm both the conviction and sentence.

I. Background

In 2000, Khorozian was approached with a moneymaking opportunity by her longtime acquaintance Eduardo Queirolo, a businessman from Brazil. Queirolo told Khorozian that a third person, Mr. Camilo, had presented Queirolo with a scheme in which he could obtain part of a sizable

commission — $6 million — if he negotiated $20,398,872 in checks through a bank in the United States. Camilo said the checks needed to be negotiated in the United States to avoid high taxes that would result were they negotiated in Brazil. Queirolo requested Khrozian's assistance in this project. It was agreed that Khorozian would receive $3 million of the commission, Queirolo and Camilio would each receive $1 million, and other unnamed individuals would split the remaining $1 million.

To facilitate negotiation of the checks, Khorozian attempted to open a commercial bank account at Hudson United Bank ("Hudson United").[1] To find out how to open such an account, she spoke with John Demetrius, a personal friend who sits on Hudson United's board of directors. Demetrius, in turn, referred Khorozian to David Yanagisawa, a Senior Vice President at Hudson United.

Yanagisawa established an account for Khorozian at a meeting in which she made three misrepresentations. First, Khorozian told Yanagisawa that she expected to make the initial deposit via wire transfer. Her statement is significant because a wire transfer is an instantaneous transfer of funds and thus would pose no financial risk to Hudson United. Yanagisawa testified that, had he known the initial deposit would be $20 million in checks, he would not have opened the account because of the increased risk. Second, Khorozian represented that she would be using the deposited funds for investment in a sugar plantation in Africa when in fact she had no such plans. Third, she opened the account in the name

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[1] Khorozian and the Government agree that it would have been impossible to negotiate $20 million in checks through a personal account.

of "Sugarbank," a New Jersey corporation whose authorization to do business had lapsed due to its failure to pay taxes.

On May 25, 2000, Queirolo received two checks. One was allegedly drawn on the account of Costco Wholesale Corp. and the other on Liberty Carton Co.'s account. The checks were both payable to an individual named Luiz Carlos Teixiera. At trial, Queirolo testified that he verified that the checks were not the result of drug or arms trafficking, that Costco and Liberty Carton had sufficient funds to pay the checks, and that the check numbers were "correct." He was unable to verify whether the signatures on the checks were genuine. Thus, because his investigative resources in Brazil were limited, he asked Khorozian to perform a more thorough investigation in the United States. She agreed and later told him that she investigated the checks and that they were good. On May 30, 2000, Queirolo arrived in the United States with the checks. Khorozian endorsed both checks as payable to Sugarbank.

The next day, Khorozian and Queirolo went to Hudson United to deposit the checks. They were assisted by the Custom Branch Manager, Anthony Moscati. At this meeting, Khorozian introduced Queirolo as "Mr. Teixeira," the individual to whom the checks were payable — a fourth misrepresentation. Moscati showed the checks to Tom Shara, the Executive Vice President in charge of commercial loans, who accepted the checks, but subjected them to a thirty-day hold for verification, given the large sum at stake.

Upon returning home, Khorozian received a fax — sloppily handwritten — instructing her and Queirolo how to distribute the $20 million. Khorozian and Queirolo had expected that they would be asked to forward the funds to a single bank account, but the fax instead

instructed them to wire money to "about five" accounts, some held by individuals with Arabic names. The fax's unexpected instructions and unprofessional appearance made Khorozian and Queirolo suspicious, according to Queirolo, but they nonetheless proceeded with their plan. In fact, Queirolo testified that, as a result of the suspicious instructions and because of concerns that Hudson United might become suspicious when asked to effect the transfers, Khorozian drew up a two-page fake "investment contract" between Sugarbank and Teixiera. The agreement purported to contain the terms of a hotel development project in Africa valued at the exact amount of the two checks. The contract specified that Sugarbank would receive a 15% commission for its work — less than the agreed-upon $6 million commission, according to Queirolo, to make it appear more credible.

Queirolo testified that he and Khorozian planned to furnish the agreement to Hudson United in the event that anyone at the bank inquired into their intentions with respect to the $20 million deposit. Khorozian contends, however, that the investment contract was genuine — that there actually was a deal between Sugarbank and Teixiera. To prove the legitimacy of the agreement and to refute Queirolo's claim that the investment agreement was drafted in response to the suspicious instructions, Khorozian sought to demonstrate at trial that she faxed a copy of the contract to Etembe Kono of the Foundation Elena, a charitable foundation in Cameroon, on May 15 — before Queirolo received the two checks drawn to Teixiera. She also sought to introduce into evidence a faxed copy of the investment contract to show that the fax header[2] was dated May 15. (The District Court refused

[2] A header is a line on the top of the faxed page generated by the fax machine and containing, among other information, the date on which the fax was sent.

to admit this fax, however, ruling that it was hearsay.) Khorozian did not present the investment contract to Hudson United, however.

Meanwhile, Hudson United attempted to verify the validity of the two checks by calling Costco and Liberty Carton. Each confirmed that it did not issue its respective check. Upon discovering that they were counterfeit, the bank called the FBI, which arrested Khorozian and Queirolo. Queirolo pled guilty to conspiracy to commit bank fraud and appeared as a Government witness at Khorozian's trial, at which the jury found Khorozian guilty of both bank fraud and conspiracy to commit bank fraud.

At sentencing, the Court believed that the intended Guideline range overstated the severity of Khorozian's offense. It therefore departed downward from the 51 to 63 month sentence recommended by the United States Sentencing Guidelines ("U.S.S.G.") and imposed a sentence of 18 months in prison on each count to run concurrently.

Khorozian appeals on four grounds: (1) the District Court should have granted her motion for acquittal because she did not know the checks were counterfeit and therefore lacked intent to defraud the bank; (2) the Court's jury instructions were deficient; (3) the Court deprived her of due process by refusing to admit a fax copy of the investment contract on hearsay grounds and by refusing to grant a continuance so that a defense witness could travel to testify; and (4) it erred in basing Khorozian's sentence on $20 million of intended loss under the Sentencing Guidelines because she did not know the checks were counterfeit and therefore had no intent to cause the bank any loss.[3]

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[3] The District Court had jurisdiction under 18 U.S.C. § 3231. We exercise appellate jurisdiction pursuant to 28 U.S.C. § 1291.

II. Discussion

A. *Motion for Acquittal*

The federal bank fraud statute, 18 U.S.C. § 1344, makes it a crime "knowingly [to] execute[ ], or attempt[ ] to execute, a scheme or artifice — (1) to defraud a financial institution; or (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises." We recently interpreted § 1344 in *United States v. Thomas*, 315 F. 3d 190 (3d Cir. 2002), holding that both parts of § 1344 must be read conjunctively: "there can be no such thing as an independent violation under subsection (2)." *Id.* at 197. Rather, "the *sine qua non* of a bank fraud violation . . . is the intent to defraud the bank." *Id.* at 197; *see also United States v. Blackmon,* 839 F. 2d 900, 905-06 (2d Cir. 1988) (holding that a conviction under the bank fraud statute requires intent to "victimize a bank"). Were we to read § 1344 disjunctively, "almost any scheme in which a victim withdraws money from a bank and turns it over to the perpetrator would become fair game under the statute. Such a reading . . . is irreconcilable with Congressional intent." *Thomas*, 315 F. 3d at 196.

Khorozian contends that there is insufficient evidence that she knew the checks were counterfeit and therefore she lacked the requisite intent to defraud Hudson United. The Government counters that there is sufficient record evidence for a jury to find that Khorozian knew the checks were counterfeit — or at least sufficient evidence to support the contention that Khorozian was willfully blind to the fact that the checks were counterfeit. In the alternative, the Government argues that a conviction under the bank fraud statute does not require that Khorozian knew the checks were invalid, only that she

made material representations to the bank that put it at risk of loss. As Khorozian's argument concerns the scope of the bank fraud statute, a question of law, our review on this issue is plenary. *Id.* at 195.

We begin by noting that "a claim of insufficiency of the evidence places a very heavy burden on an appellant," *United States v. Dent*, 149 F. 3d 180, 187 (3d Cir. 1998) (quoting *United States v. Gonzalez*, 918 F. 2d 1129, 1132 (3d Cir. 1990)), and that we must interpret all facts in the light most favorable to the Government, *United States v. Hart*, 273 F. 3d 363, 371 (3d Cir. 2001). The jury could have found that Khorozian was willfully blind to the fact that the checks were counterfeit. Queirolo instructed Khorozian to verify that the checks were genuine, but she apparently failed to do so. Had she followed Queirolo's instruction — by telephoning the drawers, for example — she would have discovered that the checks were not drawn by Costco and Liberty Carton. We point out Queirolo's instruction not because Khorozian had any legal duty to follow it, but rather because it shows his concerns — expressed to Khorozian — about the scheme's legality. Aware of Queirolo's concerns, and in light of the fact that she was attempting to negotiate over $20 million in third-party checks payable to an individual she had, according to Queirolo, never met (Teixiera), a jury could have concluded that Khorozian turned a blind eye to the checks' potential invalidity.

Moreover, Khorozian surely became suspicious after receiving the faxed instructions in sloppy handwriting.[4] As discussed, Queirolo testified that the unprofessional-looking fax and the unexpected instructions to disburse funds

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[4] While, by this time, Khorozian had already attempted to deposit the checks, she could have called Hudson United to alert the bank that the checks might not be genuine.

to multiple accounts with Arabic names (rather than a single account) made him question the transaction's legitimacy. Indeed, that fax made Khorozian so concerned about the transaction that she drafted a fake investment contract to deal with this concern. In this context, the jury could have inferred that Khorozian remained willfully blind to the checks' validity in order to receive her $3 million share of the commission. As we discuss below in connection with the jury instructions, willful blindness constitutes sufficient fraudulent intent under § 1344.

Even if Khorozian were not deliberately indifferent to whether the checks were counterfeit, the bank fraud statute nonetheless proscribes her actions. As discussed, Khorozian made four misrepresentations to Hudson United: she would make the initial deposit by wire transfer; the $20 million deposit would be invested in a sugar plantation in Africa; the company for which Khorozian opened the account, Sugarbank, was a corporation in good standing (when in fact it was not); and Khorozian introduced Queirolo as Teixiera. Mr. Yanigasawa testified that, merely for the first misrepresentation, he would not have opened the account. Thus, there is undisputed record evidence that the first misrepresentation is material: but for this false statement, the bank would not have negotiated the two checks. That misrepresentation was therefore the "first step" in Khorozian's fraudulent scheme that placed the bank at a risk of a loss.[5]

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[5] Had Hudson United actually negotiated the checks, it would have been subjected to a $20 million loss. *See Univ. Premium Acceptance Corp. v. York Bank & Trust Co.*, 69 F. 3d 695, 701 (3d Cir. 1995) ("The general rule is a bank that pays on a forged indorsement is liable to the drawer."); *see also* U.C.C. § 3-404(d).

The Government's position finds support in *United States v. Moran*, 312 F. 3d 480 (1st Cir. 2002), in which the First Circuit reversed a district court's judgment of acquittal under analogous circumstances. In *Moran*, the two defendants — an attorney representing a bank in connection with a loan and his wife, a director at the bank — failed to disclose their financial interest in the loan. Importantly, *Moran* held the defendants guilty even though they did not specifically intend to cause the bank a loss (*i.e.*, they intended that the loans would be repaid), but rather intended only to make *misrepresentations* that made a loss more likely. Specifically, because of the lawyer-defendant's relationship to the bank, he "was positioned uniquely to expedite the process by which [the investors] could obtain financing[,] . . . for instance by bypassing conventional bureaucratic impediments." *Id.* at 491. *Moran* thus illustrates that § 1344's specific intent requirement is satisfied if an individual commits an act that could put the bank at risk of loss.[6]

The cases Khorozian cites are factually distinguishable because those cases involved fraud on a third party where the bank was merely an "unwitting instrumentality" in the fraud rather than the "target of deception." *Thomas*, 315 F. 3d 201 (citation omitted). *Compare id.* at 194,

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[6] That Hudson United never actually suffered harm is also immaterial to Khorozian's defense. Section 1344 only requires that the bank be placed at risk of loss. *See United States v. Goldblatt*, 813 F. 2d 619, 624 (3d Cir. 1987) ("[I]t was not necessary for the Government to prove that the intended victim of the fraud was actually defrauded."); *accord Moran*, 312 F. 3d at 489. Moreover, in deciding whether an individual has committed bank fraud, we do not consider whether the bank exercised due care in attempting to prevent the loss (as here, by placing a thirty-day hold on the checks in question) or relied on the misrepresentations. *Neder v. United States*, 527 U.S. 1, 24-25 (1999) ("The common-law requirements of 'justifiable reliance' and 'damages' . . . plainly have no place in the federal fraud statutes.").

201-02 (bank not at risk of loss when an individual taking care of an elderly woman fraudulently induced the patient to write checks to her; because the checks were genuine, although obtained from the drawer by fraud, the bank faced no liability); *United States v. Rodriguez*, 140 F. 3d 163 (2d Cir. 1998) (bank not at risk of loss when a friend of the defendant improperly made the defendant a "vendor" in her employer's database and then wrote checks to her from the company's account); *United States v. Davis*, 989 F. 2d 244 (7th Cir. 1993) (scheme in which defendant submitted fraudulent tax returns to the IRS in the name of a homeless person, established a business and a commercial account with himself and the homeless person as signatories, and then deposited the tax refunds into the account, is not bank fraud because the bank was at no risk of loss); *United States v. Orr*, 932 F. 2d 330, 332 (4th Cir. 1991) (opening a bank account in a false name and subsequently drawing the account down to a negative balance is not bank fraud because "[w]hether the account was in [a false name] was not of significance to the giving of checks payable to certain payees and the return of such checks for reasons of insufficient funds.").

We therefore hold that 18 U.S.C. § 1344 proscribes Khorozian's actions.[7]

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[7] We do not consider other arguments Khorozian raised by way of a letter styled under Fed. R. App. Proc. 28(j). Such letters, under the Rule's express terms, may include only citations to supplemental authorities and the reasons for submitting them. Thus, supplemental arguments such as Khorozian has made are out-of-bounds.

B. *Due Process Claims*

1. Evidentiary Issue

Khorozian sought to move into evidence a fax of the (allegedly fake) investment contract sent to Kono. Khorozian alleges that she was not attempting to introduce the fax for its validity, but rather for the fact that (1) the fax header — generated by the fax machine — bore the date May 15 and (2) that the fax contained the name Teixiera. Khorozian wanted to establish, through this fax, that the investment contract was drafted on or before May 15 to refute Queirolo's testimony that it was concocted as part of a plan to deceive the bank. She also wanted to show that she and Teixiera had a commercial relationship before May 25, the date that Queirolo received the checks with Teixiera's name on them, to support her contention that she believed the funds were to be used for the investment project described in the fax (and thus that she had no intent to cause the bank loss). Reasoning that the fax was hearsay evidence, the Court refused to admit it. Khorozian argues that this ruling denied her due process. We review for abuse of discretion. *United States v. Tyler*, 281 F. 3d 84, 98 (3d Cir. 2002).

Under the Federal Rules of Evidence, any written document offered to prove the truth of the matter asserted, other than one made by the declarant while testifying, is hearsay. Fed. R. Evid. 801(c). Hearsay is inadmissible unless it falls under an exception to the evidence rule that proscribes it. Fed. R. Evid. 802. The fax at issue was hearsay. First, Khorozian's ultimate purpose for offering the fax into evidence was to establish that she intended to use the $20 million for a legitimate investment. Moreover, the fax was offered to prove that it was transmitted on May 15 from Khorozian's fax machine. Because fax headers are easily fabricated by the

sender, we view the fax header as akin to a statement by Khorozian that the fax was sent on May 15. *See Total Containment, Inc. v. Environ Products, Inc.*, 921 F. Supp. 1355, 1370 n. 3 (E. D. Pa. 1995), *affirmed in part and vacated in part on other grounds*, 1997 WL 16032 (Fed. Cir. 1997) ("Apparently, a fax burn-in can be rather easily faked. The time and date printed by the machine can be changed merely by resetting the machine. Alternatively, the burn-in from one document can be photocopied onto another document with an office copier.").

The fax does not fall into any explicit exception to the hearsay rule. And while Rule 807 provides that a "statement not specifically covered by [any of Rule 803 or 804's explicit exceptions], but having equivalent circumstantial guarantees of trustworthiness," may under certain circumstances be admitted, we do not believe that the fax header is sufficiently trustworthy to warrant the fax's admission. As noted above, fax headers are easily faked. In this context, the District Court had reason to believe that Khorozian fabricated the fax header. First, the Government presented evidence suggesting that Khorozian induced a notary to notarize falsely the investment contract. One who would do this is also likely to falsify a fax header. Second, while Kono was apparently ready to corroborate she received the fax on approximately May 15,[8] Queirolo testified that Khorozian intended to bribe an African official to authenticate the fax;[9] Kono may have been that person. While Khorozian could have introduced telephone records to corroborate the date of the fax to Kono, she did not. *Compare Total Containment*, 921 F. Supp. at 1370

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[8] The Court disallowed her testimony with respect to the fax, however.

[9] Queirolo testified that Khorozian was to receive $3 million in the scheme — as compared to his $1 million — because she needed the funds to bribe an African official.

(refusing to admit a fax to prove that its contents were received on a certain date because "[n]either the sender nor the recipient of the fax [was] identified . . . [and] [n]o phone records . . . that correlate with the alleged time and date of the fax [were] introduced.").

2. Failure to Grant a Continuance

Khorozian sought to call Maitra Goudja Abdallah Nassara, a former judge in the Republic of Chad, to testify on her behalf. However, Nassara's wife suddenly died while he was en route. He thus returned to Chad and was unable to testify on the scheduled date. Khorozian argues that the District Court abused its discretion by denying the defense a continuance until Nassara could appear. We review this denial for abuse of discretion. *United States v. Kikumura*, 947 F. 2d 72, 78 (3d Cir. 1991). Although a "myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality," denying a request for a continuance constitutes an abuse of discretion only when it is "so arbitrary as to violate due process." *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964).

We perceive no due process violation. At trial, defense counsel essentially conceded that Nassara would not be an essential witness. Counsel represented that Nassara's "testimony would be extremely limited" and that he would be asked to refer to the investment contract that the Court already refused to admit into evidence. Indeed, counsel said "I choose to rest at this time rather than ask for a delay to permit this witness to come merely to have the crux of his testimony excluded." In this

context, counsel appears to have conceded that a failure to procure Nassara's testimony would not rise to the level of a due process violation.[10]

C. *Jury Instructions*

Khorozian further argues that the District Court erred in instructing the jury. We exercise plenary review in determining "whether the jury instructions stated the proper legal standard." *United States v. Coyle*, 63 F. 3d 1239, 1245 (3d Cir. 1995). We review the refusal to give a particular instruction or the wording of instructions for abuse of discretion. *Id.* Moreover, "when we consider jury instructions we consider the totality of the instructions and not a particular sentence or paragraph in isolation." *Id.*

1. Good Faith

Because good faith is a complete defense to fraud charges — negating specific intent — Khorozian requested a jury instruction that "honest mistake of judgment does not rise to the level of an intent to defraud." The District Court declined to give this instruction, instead charging that "regardless of how misleading or deceptive a plan may be[,] it is not fraudulent if it was carried out in good faith." We discern no meaningful difference between the proposed instruction and the instruction issued. Had Khorozian made an "honest mistake of judgment," it necessarily was in "good faith." The instruction's wording that, "regardless of how misleading or deceptive a plan may be" as to the bank, it is not fraudulent if "carried out in good faith" adequately informed the jury that Khorozian's intent was critical to her conviction for bank fraud.

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[10] Khorozian has not argued that the District Court's failure to grant a continuance was plain error, and we do not perceive plain error.

2. Intent to Defraud

Khorozian also contends that the Court misinstructed the jury by charging that "the government may meet its burden to prove intent through evidence that the defendant made a material misstatement of fact with reckless disregard for the truth." She complains that "[t]his instruction emasculated the specific intent to defraud mandated by § 1344." We see no error. Although this particular statement, taken out of context, may not employ the exact language as used in Thomas, the jury instructions, taken as a whole, did communicate to the jury that it must find that Khorozian possessed the specific intent to defraud and put Hudson United at a risk of loss.

A "willful blindness" instruction "allows the jury to impute the element of knowledge to the defendant if the evidence indicates that he purposely closed his eyes to avoid knowing what was taking place around him." *United States v. Schnabel*, 939 F. 2d 197, 203 (4th Cir. 1991). "We have upheld a district court's willful blindness instruction where the charge made clear that the defendant himself was subjectively aware of the high probability of the fact in question, and not merely that a reasonable man would have been aware of the probability." *United States v. Stewart*, 185 F. 3d 112, 126 (3d Cir. 1999) (internal quotation marks omitted). A willful blindness instruction also is proper when "[t]he jury could have found that [the defendant] deliberately closed his eyes to what otherwise would have been obvious to him." *Id.*; *accord United States v. Singh*, 222 F. 3d 6, 11 (1st Cir. 2000) ("A willful blindness instruction is justified when the defendant claims to lack guilty knowledge, yet the evidence, taken in the light most favorable to the government, suffices to support an inference that he deliberately shut his eyes to the true

facts."). As we previously concluded, the evidence supported such an inference in this case. Therefore, the District Court properly issued the willful blindness instruction.

3. Scheme or Artifice to Defraud

Khorozian objects as well to the District Court's instruction with respect to the meaning of "scheme or artifice to defraud." The Court instructed that a scheme or artifice to defraud may be found "where there has been a departure from basic honesty, fair play and candid dealings" — an instruction Khorozian argues is too vague as applied in her case. We approved such a definition in *United States v. Goldblatt*, 813 F. 2d 619 (3d Cir. 1987); *accord Moran*, 312 F. 3d at 489. Moreover, the jury charge viewed as a whole clearly instructed the jurors that they needed to find specific intent to defraud in order to convict. Thus we disagree yet again with Khorozian.

D. *Sentencing Guidelines*

Khorozian also contests the District Court's application of U.S.S.G. § 2F1.1, regarding amount of loss, to calculate her sentence.[11] Because the bank suffered no actual loss, the Court necessarily sentenced Khorozian based on the loss she intended. *See* U.S.S.G. § 2F1.1 cmt. n. 8 ("[I]f an intended loss that the defendant was attempting to inflict can be determined, this figure will be used if it is greater than the actual loss."). She argues that, because she did not know the checks were counterfeit, she intended no loss and thus the District Court erred in finding that $20 million was the amount of loss. *See United States v. Geevers*, 226 F. 3d 186, 192 (3d Cir. 2000) ("It is clear that a district court errs

[11] U.S.S.G. § 2F1.1 has since been deleted and consolidated with § 2B1.1. The former § 2F1.1 can be found at Appendix C, Amendment 617 of the U.S.S.G.

when it simply equates potential loss with intended loss without deeper analysis."). We review the District Court's application of § 2F1.1 for clear error. *United States v. Evans*, 155 F. 3d 245, 252 (3d Cir. 1988).

In this context, the District Court did not err. Because we hold that the bank fraud statute reaches Khorozian's conduct — and the jury found her guilty under the statute — Khorozian intended to cause the bank loss. The Government set out a *prima facie* case of intended loss by showing that the two checks Khorozian attempted to negotiate had a face value of approximately $20 million. Khorozian did not offer any evidence to disprove this amount of loss. Thus, the Government met its burden to prove the amount of loss. *See Geevers*, 226 F. 3d at 194 ("[T]he government's presentation of the face value as evidence may make a prima facie case that the defendant intended to cause the full loss of those amounts. . . . Once the government presented this information to the District Court . . . the Court was free to accept the loss figure in the absence of persuasive evidence from [the defendant] that his intent was to steal a lesser amount.").

* * * * * * * * * * *

We hold that a jury could have found Khorozian willfully blind to the counterfeit checks and that 18 U.S.C. § 1344 proscribes Khorozian's misrepresentation to Hudson United. The District Court did not deprive Khorozian of due process by refusing to admit a faxed copy of the investment contract or by refusing to grant a continuance for a witness to testify. Moreover, the Court's jury charge was proper and it correctly applied U.S.S.G. § 2F1.1 in sentencing Khorozian. We therefore affirm.

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for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-2820

UNITED STATES OF AMERICA

v.

ANGELA KHOROZIAN,

Appellant

Present: SCIRICA, *Chief Judge*, SLOVITER, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, CHERTOFF and GARTH*, *Circuit Judges*,

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SUR PETITION FOR PANEL REHEARING
WITH SUGGESTION FOR REHEARING *EN BANC*

The petition for rehearing filed by Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the Circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is DENIED.

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* Honorable Leonard I. Garth, Senior Judge for the Third Circuit Court of Appeals, limited to panel vote only.

By the Court

/s/
Circuit Judge

Dated: JUL 22 2003
par/cc: G.S.L. Esq. H.P.F. Esq. G.Z. Esq.

PRECEDENTIAL

Filed August 25, 2003

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-2820

UNITED STATES OF AMERICA

v.

ANGELA KHOROZIAN,

Appellant

Appeal from the United States District Court
for the District of New Jersey
(D.C. Criminal Action No. 00-cr-00393-1)
District Judge: Honorable William H. Walls

Argued April 24, 2003

Before: SCIRICA,* *Chief Judge*,
AMBRO and GARTH, *Circuit Judges*

(Opinion filed June 20, 2003)

Herald Price Fahringer, Esquire
(Argued)
Erica T. Dubno, Esquire
Lipsitz, Green, Fahringer, Roll,
Salisbury & Cambria, LLP
780 Third Avenue, 32nd Floor
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* Judge Scirica began his term as Chief Judge on May 4, 2003.

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ORDER AMENDING SLIP OPINION

AMBRO, *Circuit Judge*:

WHEREAS, the panel for the captioned case has determined that a portion of the precedential Opinion filed June 20, 2003, be amended as follows (which does not affect the rights of the parties):

Delete Section II. B. 1 ("Evidentiary Issue") and replace with the following:

1. Evidentiary Issue

While Kono was on the stand, Khorozian's counsel sought to move into evidence a fax of the (allegedly fake) investment contract Khorozian sent to Kono, at the top of which was a header — allegedly generated by Khorozian's fax machine — bearing the transmission

date of May 15.[1] Khorozian wanted to establish, through this fax, that the investment contract was drafted on or before May 15 to refute Queirolo's testimony that it was concocted as part of a plan to deceive the bank. She also wanted to show that she and Teixiera had a commercial relationship before May 25, the date that Queirolo received the checks with Teixiera's name on them, to support her contention that she believed the funds were to be used for the investment project described in the fax (and thus that she had no intent to cause the bank loss).

The District Court refused to admit the fax, ruling that Kono, as the recipient of the fax, was not the proper party to lay a foundation for admitting the transmission and that, in any event, the fax was hearsay. Khorozian argues that the District Court erred and seeks a new trial.

The District Court is mistaken on both counts. The Court was correct that ordinarily a fax's sender would authenticate the document by testifying to such foundational facts as that the fax machine automatically date-stamps transmissions, that it was in proper working order, that she did not tamper with it, etc. *Cf. United States v. Branch*, 970 F. 2d 1368, 1371 n. 3 (4th Cir. 1992) (setting out as factors relevant to a foundation for admission of a tape recording, *inter alia*, that the device was in proper working order, that no alterations were made to the recording at issue, and that the operator could properly operate the machine). In this case Khorozian exercised her Fifth Amendment right against self-incrimination and thus did not take the stand. However, Kono could — and did — authenticate the fax under Federal Rule of Evidence 901(a) by testifying

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[1] The Government had already introduced an English-language version of the purported agreement in its case-in-chief, sans fax header. Khorozian sought to introduce a Portuguese-language version that she alleged she faxed to Kono.

that she received the fax on the date indicated on the header. Authentication does not conclusively establish the genuineness of an item; it is a foundation that a jury may reject.

Moreover, neither the header nor the text of the fax was hearsay. As to the header, "[u]nder FRE 801(a), a statement is something uttered by ' a person,' so nothing ' said' by a machine . . . is hearsay." 4 Mueller & Kirkpatrick, *Federal Evidence* § 380, at 65 (2d ed. 1994). The fax's contents were not hearsay because Khorozian sought to introduce the fax for the fact that it contained the name Teixiera (and was sent on May 15), not for its truth. The fax is relevant, regardless of its truth, to rebut the Government's contention that she and Queirolo fabricated the document after May 25 as part of a scheme to defraud the bank.

Because the District Court's errors were nonconstitutional — misapplication of the Federal Rules of Evidence — we may nonetheless affirm the jury's verdict if we "believe[ ] . . . that it is highly probable that the error did not contribute to the judgment." *McQueeney v. Wilmington Trust Co.*, 779 F. 2d 916, 924 (3d Cir. 1985) (emphasis removed). We do not believe that the jury's verdict would have been different had the fax been admitted. First, the other evidence against Khorozian, discussed above, was significant. Second, even were the fax introduced, it would have been consistent with the rest of the Government's case. Fax headers are easily fabricated by the sender. *See Total Containment, Inc. v. Environ Products, Inc.*, 921 F. Supp. 1355, 1370 n. 3 (E. D. Pa. 1995), affirmed in part and vacated in part on other grounds, 1997 WL 16032 (Fed. Cir. 1997) ("Apparently, a fax burn-in can be rather easily faked. The time and date printed by the machine can be changed merely by resetting the machine."). Queirolo testified

that Khorozian intended to bribe an African official to corroborate the fax. Kono may have been that person.

Third, admission of the fax would not meaningfully have aided defense counsel's ability to develop the argument that Khorozian and Teixiera had a business relationship before May 25. Kono testified that she received "a contract between Mrs. Khorozian and her investor . . . around the fifteenth [of May.]" Even if in the course of Kono's testimony it was unclear to the jury that the document she allegedly received was the investment contract containing Teixiera's name, in closing argument Khorozian's counsel drew this connection clearly. Defense counsel referred to the allegedly fabricated joint venture agreement between Sugarbank and Teixiera, bearing a date of May 8, which the Government had already introduced into evidence as a "fake." And but a minute later, counsel referred to Kono's testimony. He completed the connection by asking rhetorically: "[H]ow is it that Mrs. Kono could have gotten a copy of that document [on May 15] that wasn't even created until June 1 [according to the Government] when she got all upset about those wire instructions[?]"

We therefore hold that the District Court's errors were harmless.

By the Court

/s/ Thomas L. Ambro
Circuit Judge

Dated: August 25, 2003

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Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

August 14, 2003

AMENDED

No. 02-2820

United States of America

v.

Angela Khorozian
(NJ DC 00-cr-00393-1)

Present: SCIRICA, *Chief Judge,* Ambro and GARTH *Circuit Judges*

Motion by Appellant to Stay the Issuance of the Mandate pending a Petition for Writ of Certiorari, together with Supporting Memorandum of Law.

/s/ Phyllis Ruffin
Phyllis Ruffin 267-299-4918

Answer was due 8/11/03
Opinion & Judgment 6/20/03
Petition Rehearing Denied 7/22/03

ORDER

The foregoing motion is granted.

By the Court

/s/ Thomas L. Ambro
Circuit Judge

DATED: AUG 22 2003
par/cc: H.P.F. Esq. G.S.L. Esq. G.Z. Esq.